89-514

Supreme Court, U.S.
FILED
AUG 28 1989
JOSEPH F. SPANIOL, JR.
CLERK

No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

TRINITY COALITION, INC.
Petitioner

v.

COMMISSIONER, TEXAS DEPARTMENT OF HUMAN SERVICES, ET AL.
Respondents

Petition for Writ of Certiorari to the Court of Appeals of Texas, Eighth District

---

Fernando Chacon
310 N. Mesa, Suite 325
El Paso, Texas 79901
(915) 542-3850

QUESTIONS PRESENTED FOR REVIEW

1. Do written, binding instructions for proposal bids accepted by all parties as controlling of process and explicitly granting a right of appeal to current contractors confer a property interest triggering due process under the Fourteenth Amendment to the United States Constitution upon the current contractors?

2. Was Petitioner entitled to any hearing regarding non-renewal or unresponsive classificiation of its bid which precluded it from proceeding further for the following year's contract?

LIST OF PARTIES

TRINITY COALITION, INC.
Petitioner
Peititoner has no parent company, affiliates, or non wholly-owned subsidiaries

MARLIN W. JOHNSTON
Commissioner, Texas Department of Human Services
Respondent

JAMES B. HARVEY
Respondent

MANUEL ALDAS
Respondent

FERNANDO CHACON
Counsel of Record for Petitoner

EDUARDO N. LERMA
Counsel for Petitioner

MARIO CABALLERO
Counsel for Petitioner

EDWIN H. HORNE
Counsel for Respondents

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

TRINITY COALITION, INC.,
Petitioner

v.

COMMISSIONER, TEXAS DEPARTMENT OF HUMAN SERVICES,
Respondent

Petition for Writ for Certiorari

OPINIONS BELOW

The opinions from the state courts have not been published. Copies of the Opinions of the state courts are attached to this Petition in the Appendix.

JURISDICTION

Petitioner seeks review of an Opinion from the 8th Court of Appeals of the State of Texas rendered on October 21, 1988. The State Supreme Court dismissed the Application for Writ of Error for Want of Jurisdiction on April 5, 1989, and overruled Petitioner's timely Motion for Rehearing on May 10, 1989. This Petition for Writ of Certiorari is brought pursuant to the provisions of 28 U.S.C. Sec. 1257(a).

CONSTITUTIONAL PROVISIONS

Petitioner seeks review of state action as violative of the Fourteenth Amendment to the United States Constitution, which in pertinent part reads as follows:

> **Section 1.** . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

Petitioner asserts that Respondents' actions deprived it of rights guaranteed by the Due Process Clause of the Fourteenth Amendment.

STATEMENT

On March 28, 1988, the 41st Judicial District Court for El Paso County, Texas, after considering evidence presented on January 4, 15, and 21, 1988 signed a Temporary Injunction which made fact findings that Respondents violated their own rules and regulations regarding contract administration and the bidding process, acted arbitrarily and capriciously toward Petitioner, and violated Petitioner's right to Due Process of Law under the Fourteenth Amendment of the United States Constitution.

The district court, in part pertinent to this Petition, specifically found that Respondents refused to accept Petitioner's attempt to appeal adverse action on its proposal for the 1988 In-Home Day Care Services Contract contrary to the provisions as delineated by the Instructions for Proposals, Contract Administrative Handbook, and the Texas Administrative Code, Rule 69.64(d)(i). The Court further found that the Proposal Instructions, on page 8, explicitly extended the right of appeal to current contractors, of which Petitioner had been one for thirteen (13) years.

The district court also found that Respondent's refused Petitioner a fair and reasonable opportunity to challenge capricious, wrongful, invalid and arbitrary action by the agency, and that the contract entered into with the Y.W.C.A. for 1988 was wrongfully executed because Respondents had failed to afford Petitioner a fair and reasonable opportunity as a current contractor and sole bidder to challenge Respondents' actions for their lawfulness and validity. In this regard, the district court found that said contract could not have been executed, since the Y.W.C.A. had failed to even submit a bid, if Respondents had not wrongfully classified Petitioner's bid as "unresponsive."

Respondents admitted at the evidentiary hearing that the 1988 Proposal Instructions, which bound all parties to any bids and the bid process, explicitly grants the right of appeal on nonrenewal to current contractors. Victoria MacAdams, testifying as the Contract Manager for Respondents, testified as follows:

> Q. Now, are the 1988 proposal instructions, are they for competitive bidding only?
>
> A. Yes.
>
> Q. Now, read page eight where it states, **'current contractor has right to appeal nonrenewal.'** Where does it state on Page eight that appeal is not available for competitive bid process nonrenewals?
>
> A. **It does not explicitly say that.**
>
> Q. It does not, in fact. Please read it for the record again, ma'am.
>
> A. Okay. **"If there is a current contractor for the geographic area and the current contractor fails to receive an award . . . the current contractor may appeal the nonrenewal."** Transcript of Proceedings, Vol. III, p. 51, lines 3-17. (Emphasis added)

Victoria MacAdams also testified that the bids and process for the 1988 contract were governed by the Proposal Instructions. (Transcript of Proceedings, Vol. III. p. 51, line 25, p. 52, lines 1-3). Very explicitly, the contract manager admitted that the Proposal Instructions did not curtail Petitioner's right to appeal. Ms. MacAdams stated as follows:

> A. I don't believe on page 8 it tells you, [you] do not have the right to appeal. Transcript of Proceedings, Vol. III, p. 54, lines 9-10.

MacAdams also testified that a current contractor's right to appeal a nonresponsive classification was not abridged anywhere in the Instructions. (Transcript of Proceedings, Vol. III, p. 54, line 24-25 and p. 55, lines 1-8).

In reaching its findings and conclusions, the district court considered the fact that according to MacAdams, no one else could have been hurt by allowing Petitioner to appeal since no one else had bid. (Transcript of Proceedings, Vol. III, p. 59, lines 18-23. The district court also had before it testimony from MacAdams that Petitioner's bid proposal did not receive full consideration due to the nonresponsive classification. (Transcript of Proceedings, Vol. III, p. 57, lines 22-25, p. 56, lines 1-2).

Taken in the worst light to Petitioner, its right to an appeal under the statutes and the Texas Administrative Code would have been disallowed only if the contract had been awarded to another agency in the same geographic area who had **competitively** bid on the contract. (40 Texas Administrative Code Sec. 69.94(d) (i). In this case, the agency to whom the contract was awarded received it through non-competitive procedures since it did not even submit a bid through competitive bidding.

Key to the issue of whether or not the Respondents acted properly in moving to non-competitive bidding is the practical construction of the definition of an **unresolved audit exception.** The definition reads as follows:

> An unresolved audit exception is an exception for which the contractor has exhausted all administrative and judicial remedies and **also refuses** to comply with **written demands** for payment from [the Texas Department of Human Services]. Transcript of Proceedings, Vol. III, p. 28, lines 4-9.

The district court had before it testimony from Respondent James Harvey, who as Regional Commissioner for ten years, claimed to be unfamiliar with what constitutes an "unresolved audit exception." After evading the issue of the necessity of written demands in the plural, Harvey equated such an exception with an unpaid audit exception without clarification as to what he meant by unpaid other than to say the Department had not received payment. (Transcript of Proceedings, Vol. I, p. 17, lines 12, 15-16).

The definition, on its face, requires that the agency owing money have refused to make payment, and that such refusal come after written demands for payment have been made. Throughout the hearings, and nowhere in the record, could Respondents ever point to more than one demand having been made for payment, other than one letter setting forth a proposed payment program.

As the district court found upon consideration and weighing of the evidence as well as assigning credibility to the witnesses, Respondents acted arbitrarily and capriciously by failing to properly apply their own definition, as stated, of an unresolved audit exception. Without such a classification, Petitioner's bid could not have been classified as nonresponsive. Absent such classification, Respondents could not have gone outside the competitive bidding process to award the contract to another agency. Such was the basis of the district court's ruling on the Temporary Injunction.

The 8th Court of Appeals, without benefit of extensive analysis or discussion of the rationale for over-

turning the Temporary Injunction, classified the Temporary Injunction as an action compelling the State to enter into a contract and overruled the district court. However, the district court explicitly instructed the State to resume negotiations with petitioner at the point where these were arbitrarily, capriciously, and wrongfully dropped. Any contract that evolved came as a consequence of Respondents abiding by the district court's mandate to follow proper procedure and was not a part of the appeal as originally presented.

Petitioner presented its constitutional challenge from inception. The district court, based on a full review and assessment of evidence, granted a Temporary Injunction to preclude Respondents from furhter violation of proper procedure and to compel them to follow through on the bid process as required by State law and agency regulation and policy. The Court of Appeals, without explicitly overruling the district court's findings, overruled the Temporary Injunction. Petitioner's Motion for Rehearing, based pricipally on the constitutional claim, was denied. Although the Application for Writ of Error before the State Supreme Court presented the constitutional argument as its pivotal point, the Supreme Court of Texas dismissed for want of jurisdiction. In relevance to this Petition, Petitioner's constitutional claim was presented from inception and has been raised at each step of the procedures.

ARGUMENT

The cornerstone of Petitioner's argument is whether or not a property interest gave rise to applicability of the Due Process Clause. The district court, having found explicit and specific violations of rules and regulations as well as arbitrary and capricious conduct based upon a review of the evidence presented, found that petitioner's right to due process of law was indeed violated.

The nature of the interest at stake controls on the issue of whether or not due process applies. **Board of**

Regents v. Roth, 408 U.S. 564, 571, 33 L.Ed.2d 548, 557, 92 S.Ct. 2701 (1972). Property interests do not arise from the constitution itself, but rather they are created and defined by existing rules or understandings that stem from independent sources, such as state law. **Board of Regents v. Roth,** 408, U.S. 564,577, 92 S.Ct. 2701, 2709, 33 L.Ed. 2d 548 (1972). An entity may have its interest rise to the level of a property interest for due process purposes if there are such rules or mutually explicit understandings that support its claim of entitlement to continued enjoyment of the contract and that it may invoke at a hearing. **Perry v. Sinderman,** 408 U.S. 593, 602, 92 S.Ct. 2694, 2699, 33 L.Ed.2d 548 (1972). Entitlement may be expressed in a contract, a statute, **or through the existence of rules and understandings, promulgated and fostered by state officials,** that may justify his legitimate claim of entitlement to continued receipt of benefits to continuation absent just cause. **Perry v. Sinderman,** 408 U.S. at 602—03, 92 S.Ct. at 2700.

Once a property interest has been found to exist, federal constitutional law determines whether an interest rises to the level of a legitimate claim of entitlement protected by the Fourteenth Amendment. **Memphis Light, Gas & Water Division v. Craft,** 436 U.S. 1, 9, 98 S.Ct. 1554, 1560, 56 L.Ed.2d 3] (1978). Property interests protect those claims upon which people rely in their daily lives, and which reliance is not arbitrarily underminded. **Board of Regents v. Roth,** 408 U.S. at 577, 92 S.Ct. at 2709. A state or local requirements or policy conferring the right to an appeal, such as a just cause termination, creates a property right in continued enjoyment without arbitrary termination. **Schaper v. City of Huntsville,** 813 F.2d 709, 713-14 (5th Cir. 1987).

Once a determination has been made that the Due Process Clause applies, the federal constitution, and not state law, determines what process is due. **Cleveland Board of Education v. Loudermill,** 470 U.S. 532, 541, 84 L.Ed.2d 494, 503, 105 S.Ct. 1487 (1985). Depending on the

circumstances and interest at stake, a fairly extensive constitutionally required evidentiary hearing may be necessary unless some kind of hearing ensuring an effective initial check against mistaken decision is provided before the deprivation occurs and a prompt opportunity for complete administrative and judicial review is avilable. **Brock v. Roadway Express, Inc.**, 481 U.S. 252, 261-262, 95 L.Ed.2d 239, 250, 107 S.Ct. 1740 (1987). In the instant case, Respondents explicitly stated in their Instructions for Proposals that current contractors are entitled to appeal nonrenewal or cutback in funds. Respondents even admitted that nowhere in the Instructions was there any explanation that curtailed that right. The state administrative code furthermore states that an appeal is foreclosed only if the contract is awarded to another agency in the same geographic area who competitively bid on the contract. Such was not the case here. The contract was given to an agency solicited by Respondents subsequent to wrongfully classifying Petitioner's bid as nonresponsive.

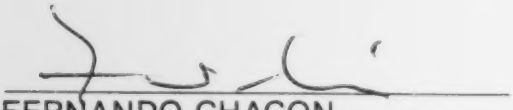
Petitioner submitted an appeal in timely fashion but was denied consideration by Respondents. Petitioner's Motion for Rehearing on the decision not to consider the appeal was also denied by the Department's administrative law judge. Consequently, Petitioner was totally deprived and cut-off from any appeal whatsoever. Based on the governing Instructions for Proposals, a clear and unequivocal grant of an appeal was available to Petitioner, who was the current contractor at the time of its bid for the following year.

As the district court found in its Temporary Injunction, Respondents deprived Petitioner of due process of law under the Fourteenth Amendment to the United States Constitution. This Petition for Writ of Certiorari should be granted to consider the conflict of the opinions of the 8th Court of Appeals of Texas and the Texas Supreme Court in overruling the finding that Petitioner had a vested property interest in protecting the contract

against arbitrary, capricious and wrongful denial of renewal. Since appeal rights were clearly granted by governing policies and regulations, Petitioner was entitled to consideration of its appeal in a meaningful manner and under the minimum procedures required by the federal constitution. Respondents' refusal to consider the appeal, therefore, deprived Petitioner of due process of law.

WHEREFORE, Petitioner respectfully moves that this Court grant a Writ of Certiorari to consider the conflict between federal case law regarding applicability of the Fourteenth Amendment to state administrative actions and the finding of the state appellate courts in the case below.

Respectfully submitted,



FERNANDO CHACON
Petitioner
Attorney at Law
Texas Bar No. 04052800
310 N. Mesa, Suite 325
El Paso, Texas 79901
(915) 542-3850

CERTIFICATE OF SERVICE

I certify that three true and correct copies of this corrected Petition for Writ of Certiorari have been by mail served upon counsel for Respondents, Mr. Edwin Horne, and the Hon. Jim Mattox, Attorney General of Texas, General Litigation Division, P.O. Box 12548, Capitol Station, Austin, Texas 78711 as required by the Rules of this Court on the 25 day of September, 1989.

Fernando Chacon

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SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

May 10, 1989

Mr. Eduardo N. Lerma
1417 Montana
El Paso TX 79902

Mr. Edwin N. Horne
Office of the Attorney General
Jim Mattox, A. G.
P.O. Box 12548 Capitol Station
Austin TX 78711

RE: Case No. C-8302

STYLE: TRINITY COALITION, INC.
v. COMMISSIONER, TEXAS DEPARTMENT OF HUMAN SERVICES ET AL.

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Respectfully yours,

John T. Adams, Clerk

By /S/
Deputy

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

April 5, 1989

Mr. Eduardo N. Lerma
1417 Montana
El Paso, TX 79902

Mr. Edwin N. Horne
Office of the Attorney General
Jim Mattox, A. G.
P. O. Box 12548 Capitol Station
Austin TX 78711

RE: Case No. C-8302

STYLE: TRINITY COALITION, INC.
v. COMMISSIONER, TEXAS DEPARTMENT OF HUMAN SERVICES ET AL.

Dear Counsel:

Today, the Supreme Court of Texas dismissed for want of jurisdiction the application for writ of error in the above referenced case.

Respectfully yours,
Mary M. Wakefield, Clerk

By _____
Deputy

COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

COMMISSIONER, TEXAS DEPARTMENT OF HUMAN SERVICES, et al.,	)	
Appellants,	)	No. 08-88-00095-CV
v.	)	Appeal from 41st District Court of
TRINITY COALITION, INC.,	)	El Paso County, Texas. (TC# 87-9474)
Appellee.	)	

JUDGMENT

This cause came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of this Court that there was error in the granting of the temporary injunction, it is therefore ordered, adjudged and decreed that the order of the court below be reversed and the cause remanded to the trial court with instructions to enter an order of dismissal, in accordance with the opinion of this Court; and that the Appellants do have and recover of and from the Appellee all costs incurred by reason of this appeal, for which let execution issue, and this decision be certified below for observance.

IT IS SO ORDERED THIS 21ST DAY OF OCTOBER, 1988.

/ S / Jerry Woodard
Justice, Court of Appeals for the
Eighth District of Texas.

Before Panel No. 1
Osborn, CJ., Schulte and Woodard, JJ.

COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

COMMISSIONER, TEXAS DEPARTMENT OF HUMAN SERVICES, et al.,	)	
Appellants,	)	No. 08-88-00095-CV
v.	)	Appeal from 41st District Court of
TRINITY COALITION, INC.,	)	El Paso County, Texas. (TC# 87-9474)
Appellee.	)	

OPINION

This is an appeal from an order granting temporary injunction. We reverse.

Trinity had provided home day care services in the El Paso area under contracts with Texas Department of Human Services since 1975. In October of 1987, T.D.H.S. attempted to cancel the prevailing contract because of Trinity's alleged failure to meet staffing qualifications and other requirements. The trial court enjoined the cancellation. The contract expired under its own terms on December 31, 1987.

Trinity was refused bidding rights to the 1988 contract because of a purported unresolved audit exception (monies owed to T.D.H.S.) in the amount of $48,538.13. An unresolved audit exception is defined in the information screening instructions (T.D.H.S. TITLE XX DAY CARE, Request For Proposal Specifications, at 16) as an "exception for which the contractor has exhausted all administrative and judicial remedies and also refuses to comply with resulting written demands for payment from the Department." The amount determined to be owed was upheld by the T.D.H.S. departmental administrative appellate process. Demand for payment on the amount was made but not honored by Trinity. Trinity had put forth

in its bidder's application form that the matter had been resolved with a negotiated payment plan. T.D.H.S. confuted this on the day of bidding, treated this statement as a refusal to pay, and invalidated Trinity's bid as being "non-responsive" as directed by T.D.H.S. Contract Administrative Handbook section 2142.11(13), created under the authority of Tex. Dept. Hum. Svcs., 40 Tex. Admin. Code, sec. 69,000, et seq (Hart Nov. 1, 1986). The statutory foundation for this precept was Tex.Rev.Civ.Stat.Ann. arts. 4350 (Vernon 1976), presently codfied in Tex.Gov't.Code Ann. sec. 403.055 (Vernon Pamphlet 1988). This provides that no warrant shall be issued to any person, his agent or assignee, who is indebted to the state, until such debt is paid.

On March 28, 1988, the trial court voided the newly made contract with the Y.W.C.A., prohibited T.D.H.S. from classifying the audit matter as "unresolved" and the Trinity bid as "non-responsive." It further ordered the bidding process to be resumed.

A suit brought to control State actions or to subject the State to liability is not maintainable without legislative consent or statutory authorization. An entity or person whose rights have been violated by the unlawful action of a State official may bring suit to remedy the violation or prevent its occurrence, and such suit is not a suit against the State requiring legislative or statutory authorization. **Director, Of Department Of Agriculture And Environment v. Printing Industries Association of Texas,** 600 S.W.2d 264 (Tex. 1980). In other words, an officer who ventures into an ultra vires act steps beyond the State's inviolable mantle, and becomes individually subject to corrective measures. An officer who acts within the State's laws, stays within that pavilion of immunity. Here, T.D.H.S. acted within its own delineated procedure in regulating the terms, bidding and acceptance of contracts for day care services. This prerogative was properly delegated to it by the State.

Trinity alleges that it was deprived of property

without due process of law in the bid refusal procedure. Pre-contract negotiations, expectations, prospects, or pursuits are not the vested property rights, benefits or interests which are constitutionally protected by procedural due process.

Trinity is attempting to compel a contractual relationship with the State. A suit against state officers with the purpose and effect of establishing the validity of a contract of the state, or to enforce through them the performance of a contract of the state, or to require acts to be performed by them which would impose contractual liabilities upon the state is a suit against the state. **W. D. Haden Company v. Dodgen.,** 308 S.W.2d 838 (Tex. 1958). In absence of legislative consent, the suit is not maintainable.

The injunction decree is vacated and the case is reversed and remanded to the trial court with instructions to enter an order of dismissal in accordance with this opinion.

/ S / Jerry Woodard

October 21, 1988 JERRY WOODARD, Justice

Before Panel No. 1
Osborn, C.J., Schulte and Woodard, JJ.

IN THE DISTRICT COURT NUMBER FORTY-FIRST

EL PASO, TEXAS

TRINITY COALITION, INC. Plaintiff	)	
vs.	)	No. 87-9474
COMMISSIONER, TEXAS DEPARTMENT OF HUMAN SERVICES, et. al. Defendants	)	

TEMPORARY INJUNCTION

The Motion of TRINITY COALITION, INC., Plaintiff in this cause, for a temporary injunction came on regularly for hearing on January 4th, 15th, and 21st, 1988, due notice having been given. The parties appeared in person and by their attorney of record. On considering the evidence received and the argument of counsel, the Court finds and concludes that Plaintiff will probably prevail on the trial of this cause; that COMMISSIONER, TEXAS DEPARTMENT OF HUMAN SERVICES, JAMES B. HARVEY, and MANUEL ALDAS, defendants herein, intend to continue denying renewal of the 1988 In-Home Day Care Services contract to Plaintiff and intend to continue said contract with the Y.W.C.A. in violation of the Texas Administrative Code, T.D.H.S. contract Handbook, and 1988 Proposal Instructions, provisions governing the administration and award of contracts by T.D.H.S. to contractors; that if Defendants carry out that intention, they will thereby alter the status quo that would probably exist but for Defendants' failure to follow and adhere to its own applicable rules, policies, and regulations and tend to make ineffectual a judgment in favor of Plaintiff, in that. As required by Rule 683, Texas Rules of Civil Procedure, the Court finds and concludes from the evidence as follows:

1. The doctrine of sovereign immunity does not preclude the Court from acting in this Cause for the following reasons:

   a. The wrongful actions of State Officials are presumed not to be actions of the State of Texas;

   b. Injunction may issue to enjoin acts of State officials when they have acted illegally, unreasonably, or arbitrarily, and

   c. Injunction may issue to compel State officials to perform a clear duty.

2. Defendants violated their own rules and regulations regarding contract administration and the bidding process as follows:

   a. By failing to abide by the governing principles as enunciated in the Contract Administration Handbook §1211 by not basing contract decisions on findings of fact appropriately documented and on good business practices and judgment, not taking reasonable steps to provide potential contractors fair and impartial treatment, not taking steps necessary to embrace mutual understanding of the contract terms by parties to the contract, and not taking reasonable steps to inform contractors of their responsibilities and liabilities under the contract.

   b. By failing to give clear and specific screening criteria by not providing clear information as to the precise meaning of "refusal to pay" as applicable to the definition of an "unresolved audit exception" as required by the Contract Administration Handbook §2142.11(13).

c. By wrongfully classifying the outstanding audit exceptions as "unresolved". Defendants failed to give notice of their intent to classify the audit exceptions as "unresolved" and failed to pursue payment beyond the initial August 18, 1987 letter setting forth its position on repayment, thereby failing to establish "refusal to pay" as required by the definition of "unresolved audit exceptions".

d. By proceeding to enter into a contract for services with the Y.W.C.A. outside the bidding process after wrongfully classifying Plaintiff's bid as "nonresponsive", and proceeding into noncompetitive negotiations while a responsive offer was pending in violation of the 1988 Instructions for Requested Proposals, page 6, and the bidding procedures as defined in the Contract Administration Handbook §2135 and §2141.

e. By failing to adhere to the requirements as listed in the procurement package and in violation of the Contract Administration Handbook §2147.11.

f. By failing to obtain a waiver documenting compelling reason to deviate from proper process as required by the Contract Administration handbook §1140 and by entering into non-competitive negotiations with the Y.W.C.A. while a responsive proposal was pending.

g. By entering into a contract with the Y.W.C.A. without having received a timely bid in violation of the Contract Administration Handbook §2145.1.

3. Defendants Harvey and Aldas acted arbitrarily and campriciously, along with other agents, servants, or employees of T.D.H.S. by:

   a. Subjecting Plaintiff to an attempted termination without a hearing of the 1987 contract for services on two separate occasions, the first being the termination notice on September 25, 1987, and the second the notice on October 9, 1987.

   b. Subjecting Plaintiff to the termination of the 1987 contract and nonrenewal of the 1988 contract for pretextual reasons. Specifically, Defendants acted in bad faith by making additional demands of Plaintiff each time that prior demands were satisfied (i.e., staffing and supervision demands for the 1987 contract termination and validation requests for the 1988 contract nonrenewal) to prevent Plaintiff from being able to obtain a position satisfactory to T.D.H.S.

   c. By exchacerbating the pressure and harassment of Plaintiff by pursuing the 1987 contract termination and the 1988 contract nonrenewal concurrently.

   d. By deliberately applying a wrong interpretation of the definition for an "unresolved audit exception" to Plaintiff's outstanding audit exceptions in order to allow T.D.H.S. to pursue negotiations with the Y.W.C.A. outside of the competitive bidding process.

   e. By seeking termination of the 1987 contract immediately after resignation of the former Administrator without giving the present management adequate opportunity to comply with staffing needs and by refusing to acknowledge the efforts made by the

present management to comply with the contract and additional T.D.H.S. demands.

f. By failing to afford the present management any opportunity to complete resolution of the outstanding audit exceptions prior to classifying these as "unresolved."

g. By refusing or failing to provide any notice of their intent regarding the outstanding audit exceptions, thereby precluding any opportunity for response from Plaintiff prior to its bid having been classified as nonresponsive.

4. Defendants violated Plaintiff's right to due process of law under Article I, Section 3 of the Texas State Constitution and the Fourteenth Amendment of the United States Constitution by:

a. Failing to give Plaintiff notice of their intent and action to proceed to classify the outstanding audit exceptions as "unresolved".

b. Failing to provide Plaintiff with proper notice of the intended status of the audit exceptions by not defining the meaning of "refused to pay" within the definition of an "unresolved audit exception".

c. Failing to provide Plaintiff with proper notice of their intent not to renew the 1988 contract by not providing clear notice that no other payment plan proposal would be considered, that the August 18, 1987 proposal was the State's final position, or the consequences as to the 1988 contract if the August 18, 1987 proposal was not accepted by Plaintiff.

d. Refusing to accept Plaintiff's attempted appeals thereby denying Plaintiff a fair and reasonable opportunity to prevent deprivation

of the 1988 contract as a current contractor and the sole bidder for 1988 as delineated by the instructions for Proposals, Contract Administration Handbook and Texas Administrative Code, Rule 69.64(d) (i), of the nonrenewal notice for the 1988 contract after extending the right of appeal to current contractors in the 1988 Instructions for Proposals, page 8.

e. Refusing Plaintiff a fair and reasonable opportunity to challenge wrongful, invalid, arbitrary and capricious actions by Defendants as allowed by Article 6252-13e of the Texas Annotated Civil Statutes and Article 60.64 of the Texas Administrative Code.

f. Entering into a contract with the Y.W.C.A. for the 1988 In-Home Day Care Services program without affording Plaintiff a fair and reasonable opportunity as a current contractor and sole bidder to challenge Defendants' actions for their lawfulness and validity.

5. Defendants wrongfully entered into a contract with the Y.W.C.A. for the 1988 In-Home Day Care Services by:

a. Failing to adhere to the provisions of the Contract Administration Handbook §§1211, 2142.11(13), 2135, 2141, 2147.11, 1140, 2145.1 and 2147.21.

b. Wrongfully classifying the outstanding audit exceptions as "unresolved", thereby negating any basis for Plaintiff's bid classification of "nonresponsive".

c. Entering into non-competitive negotiations and contracting with the Y.W.C.A. when the sole reason for classifying Plaintiff's bid as

"nonresponsive" was arbitrary, capricious, wrongful and invalid, thereby negating any proper basis for terminating the proper process with Plaintiff and securing a non-competitive agreement with the Y.W.C.A.

The Court further finds that unless Defendants are deterred from carrying out their actions, Plaintiff will be without any adequate remedy at law in that Defendants will continue to classify the outstanding audit exceptions as "unresolved", classify Plaintiff's bid for the 1988 contract as "nonresponsive", maintain its invalid and void contract with the Y.W.C.A., and preclude Plaintiff from pursuing any appeal or other remedy to seek redress for injury and damages. The Court finds that unless their Temporary Injunction issue pending final hearing herein, Trinity Coalition will suffer irreperable injury, in that their organization will be unable to continue to function and its employees will, of necessity, seek other employment.

IT IS, THEREFORE, ORDERED that Defendants herein, be, and they hereby are, commanded forthwith to desist and refrain from classifying Plaintiff's outstanding audit exceptions as "unresolved" and Plaintiff's bid for the 1988 contract as "nonresponsive".

IT IS FURTHER ORDERED that the contract between the TEXAS DEPARTMENT OF HUMAN SERVICES (T.D.H.S.) and the YOUNG WOMENS CHRISTIAN ASSOCIATION (Y.W.C.A.) is hereby declared VOID and of no effect.

IT IS FURTHER ORDERED that the bidding process between T.D.H.S. and TRINITY COALITION, INC., be resumed at the negotiations stage, resuming at the stage at which the bidding process was terminated subsequent to Plaintiff's bid being deemed nonresponsive, and that Plaintiff be permitted its right of appeal of any unfavorable finding.

IT IS FURTHER ORDERED tht the bidding process be completed not later than March 4, 1988, to include any

possible administrative appeal.

IT IS FURTHER ORDERED that T.D.H.S. and the Attorney General's office fully cooperate with any other agency seeking to review the audits to fix responsibility for unaccounted funds as a consequence of the 1984 and 1985 audits, with a view toward determining individual responsibility for subject losses.

IT IS FURTHER ORDERED that T.D.H.S. be enjoined from awarding the contract subject of this controversy to any other agency, pending the resolution of the bidding process and any possible appeal by Plaintiff. Supervision of the In-Home Day Care Program during the interim will be provided by present employees of T.D.H.S.

IT IS FURTHER ORDERED that, time being of the essence for resolution of this matter, trial on the merits of this cause is ordered set for the_____day of_____, _____1988, at_____ .m. o'clock.

the previous bond of FIVE HUNDRED DOLLARS ($500,00) set in this case by Plaintiff will suffice for bond in this continued action, and the Clerk shall forthwith issue a temporary injunction in conformity with the law and the terms of this order.

SIGNED this_____day of March, 1988.

/ S /
JUDGE PRESIDING

APPROVED AS TO FORM:

/ S /
EDUARDO N. LERMA
Attorney for Plaintiff
Texas Bar #12221300

/ S /
EDWIN N. HORNE
Attorney for Defendants
Texas Bar #10008000

Supreme Court, U.S.
FILED
NOV 29 1989
JOSEPH F. SPANIOL, JR.
CLERK

(2)

NO. 89-514

IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1989

TRINITY COALITION, INC., Petitioner
V.
COMMISSIONER, TEXAS DEPARTMENT OF
HUMAN SERVICES, ET AL., Respondents

RESPONDENTS' BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

JIM MATTOX
Attorney General of Texas

MARY F. KELLER
First Assistant Attorney
General

LOU McCREARY
Executive Assistant
Attorney General

JAMES C. TODD, Chief
General Litigation
P.O. Box 12548
Capitol Station
Austin, Texas 78711-2548
COUNSEL OF RECORD

COUNSEL FOR
RESPONDENTS

QUESTION PRESENTED

1. WHETHER AN UNSUCCESSFUL BIDDER FOR A STATE OFFERED CONTRACT HAS A PROPERTY RIGHT WHICH IS CONSTITUTIONALLY PROTECTED BY DUE PROCESS OF LAW.

LIST OF PARTIES

Trinity Coalition	Petitioner
Ron Lindsay Commissioner Texas Department of Human Services	Respondent
James B. Harvey	Respondent
Manuel Aldas	Respondent
Fernando Chacon Eduardo N. Lerma	Counsel for Petitioner
James C. Todd, Chief General Litigation Division	Counsel for Respondents
Edwin N. Horne Assistant Attorney General	Counsel for Respondents

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NO. 89-514

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IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1989

* * * * * * * * * * * * * * * * *

TRINITY COALITION, INC., Petitioner
V.
COMMISSIONER, TEXAS DEPARTMENT OF HUMAN SERVICES, ET AL., Respondents

* * * * * * * * * * * * * * * * *

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

* * * * * * * * * * * * * * * * *

OPINIONS BELOW

The opinion of the 41st District Court of El Paso County, Texas is unpublished. The opinion of the Texas Court of Appeals is published as *Commissioner, Texas Department of Human Services v. Trinity Coalition, Inc.*, 759 S.W. 2d 762 (Tex. App.--El Paso, 1988, writ dism'd w.o.j.

STATEMENT OF THE CASE

The instant appeal concerns the actions taken by the Respondents, officials of the Texas Department of Human Services (TDHS), during the competitive bidding process for a contract to provide day care services to low income families in the El Paso, Texas area.

Pursuant to authority conferred by the Texas Human Resources Code §22.002 (f) (Vernon, 1980), TDHS is authorized to enter into contracts with public or private agencies in order to accomplish the purposes of the department's programs. The

TDHS Contract Administration Handbook (CAH) sets forth the rules and regulations which govern contract procurement and administration. The CAH provisions are codified in 40 T.A.C. §69.000, et seq. *(Exhibit I, S.F. Vol. I), See Appendix A-2.*

In August of 1987, TDHS determined that it would solicit bids for the 1988 day care services contract. *(Statement of Facts, Vol. III, P. 14, lines 17-25).* TDHS has the authority to renew an existing contract or award a new contract through the competitive procurement process. *40 T.A.C. §69.204 (Statement of Facts, Vol. III, p. 17); See Appendix A-2.* In accordance with its rules and regulations regarding competitive bidding, TDHS published a request for bid proposals for the 1988 contract. TDHS notified the holder of the 1987 contract, Petitioner, that its contract would not automatically renew. Although agency regulations provide current contractors with an appeal following non-renewal, Petitioner did not request an appeal.

On October 5, 1987, Petitioner timely submitted a bid for the 1988 contract. Following a review of Petitioner's bid, TDHS determined that it was a non-responsive bid because it failed to meet all screenable criteria set forth in the bid packet. TDHS notified Petitioner in writing that its bid was deemed non-responsive due to the existence of an unresolved audit exception. An unresolved audit exception was defined in the bid packet as an "exception for which the contractor has exhausted all administrative and judicial remedies an also refuses to comply with written demands for payment from the department". *(Exhibit D-1, Statement of Facts Vol. III).* The bid was consequently precluded from further consideration. *(Transcript of Proceedings, p. 127);* 40 T.A.C. §69.227; See Appendix A-2. Petitioner attempted to appeal the rejection of the bid as non-responsive. The TDHS

hearing officer notified Petitioner than an appeal of the bid rejection was not available. *(Transcript of Proceedings pp. 177-178).*

Following the rejection of Petitioner's bid, the only bid submitted, TDHS negotiated with and awarded the 1988 contract to the YWCA pursuant to the authority conferred by 40 T.A.C. §69.209 (4); See Appendix A-2.

Petitioner filed suit in the 41st District Court of El Paso County, Texas, seeking declaratory and injunctive relief and damages based, in part, upon allegations that the denial of an appeal following the rejection of Trinity Coalition's bid violated Petitioner's due process rights.

The El Paso District Court entered a temporary injunction based upon findings that Respondents violated agency rules and regulations regarding contract procurement, acted arbitrarily and capriciously, and in violation of Petitioner's due process rights during the bidding process for the 1988 contract.

On appeal, the Texas Court of Appeals vacated the temporary injunction and remanded the case with instructions for dismissal on sovereign immunity grounds after finding that the Respondents' actions were in conformity with and authorized by agency policies and procedures regarding contract procurement. The Court of Appeals specifically held that "precontract negotiations, expectations, prospects, or pursuits are not the vested property rights, benefits or interests which are constitutionally protected by procedural due process". *Commissioner, Texas Department of Human Services v. Trinity Coalition, Inc.*, 759 S.W.2d 762, 764 (Tex. App.--El Paso, 1988). The Texas Supreme Court dismissed

Petitioner's Application for Writ of Error for want of jurisdiction, and subsequently overruled Petitioner's Motion for Rehearing.

ARGUMENT FOR DENIAL OF THE WRIT

Petitioner seeks review by this Court based upon allegations that Respondents violated Petitioner's due process rights in failing to permit Petitioner to appeal the classification of its bid as non-responsive. While Respondents agree with Petitioner's discussion of the legal requirements of the Due Process Clause of the Fourteenth Amendment, with respect to vested property rights, Respondents disagree with Petitioner's interpretation of the facts in support of its purported vested property right to the 1988 contract. Under Texas law, the Court of Appeals is the final arbitrator of the facts. *Tex. Gov. Code §22.001 (a) (6).*

The law regarding the existence of a property right giving rise to due process protection is clearly established. Consequently, Petitioner has failed to demonstrate that there are special and important reasons for the exercise of this Court's discretion as is set out in Rule 17 of the Supreme Court Rules. The requirements of due process apply only to deprivations of property and liberty protected by the Fourteenth Amendment. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 2705 (1972). The first inquiry then is the nature of the interest at stake. *Id. 92 S.Ct. at 2706.* Property interests are created by independent sources such as state law, rules and regulations. Persons asserting the improper denial of a property right must have more than a unilateral expectation in a benefit; there must be a mutually explicit understanding in support of the

property right asserted. *Perry v. Sinderman*, 408 U.S. 593, 92 S.Ct. 2694, 2699 (1972).

The flaw in Petitioner's argument lies in the fact that the submission of a contract bid does not give rise to a property interest. Petitioner repeatedly attempts to confuse the nature of its interest in the 1988 contract by characterizing the rejection of its bid for the 1988 contract as a non-renewal of the 1987 contract.

Petitioner seeks to manipulate the rights of appeal conferred by state law and agency regulation by mischaracterizing the circumstances surrounding the bidding procedure for the 1988 contract in an attempt to justify its claim of a property right in the 1988 contract. Petitioner incorrectly classifies the contract as a renewal and also claims a right to appeal as a current contractor. Based upon this erroneous characterization, Petitioner asserts that applicable state laws and TDHS regulations confer a property right entitling Petitioner to an appeal.

Although regulations at 40 T.A.C. §69.204 permit TDHS to renew an existing contract at TDHS' option, the T.A.C. specifically provides that "renewal of a contract is not automatic". *(Statement of Facts Vol. II, p. 17, lines 14-21); 40 T.A.C. §69.204 (c); See Appendix A-2.* With respect to the 1988 contract for day care services, TDHS made the decision to award a new contract through the competitive procurement process, rather than renew the existing 1987 contract. *(Statement of Facts Vol. III, P. 16, Lines 17-25).* Correctly stated, the 1988 contract was to be a new contract awarded to a qualified bidder through the competitive procurement process, rather than a renewal of the 1987 contract. Petitioner's bid was rejected. TDHS rules do not permit a hearing on the failure to get a bid. Petitioner continually

expounds on its "understandings" and "expectations" created by a misrepresentation of the relevant statutory and regulatory requirement. Such unilateral expectations do not, however, give rise to a property interest protected by due process. As indicated in correspondence between the parties, Petitioner's attempted appeal clearly arose from the rejection of its bid for the 1988 contract. See Appendix A-3-7. Under the relevant statutory and agency policy provisions, an appeal from the denial of a bid is clearly not available. *Tex. Rev. Civ. Stat. art. 6252-13e § 9 (i).*

Petitioner relies on language in the Proposal instructions which reads in relevant part...

> 'the current Contractor may appeal the nonrenewal or funding reduction under the auspices of Senate Bill 117...

Senate Bill 117 was codified as *Tex. Rev. Civ. Stat. art. 6252-13e.* As amended in 1985, appeal rights are not afforded to entities who become subject to the agency's competitive bidding process. Tex. Rev. Civ. Stat. art. 6252-13e §9(i) specifically provides that notice and hearing are not required if the denial of a contract is the result of the competitive procurement process. *(Statement of Facts Vol. I, p. 59, lines 6-17; See also, Statement of Facts Vol. I, Ex. p. 16-17); See also, Appendix A-5.* Petitioner does not dispute that it was engaged in the competitive procurement process. The "understanding" Petitioner claims exists with regard to its appeal rights is not supported by a clear reading of the applicable statutes and regulations. Petitioner professes to have an "understanding" that it was negotiating or had an interest in the contract, however, this unilateral "understanding" does not give rise to a property interest protected by due process. *Roth, 92 S.Ct. at 2709.* Petitioner's mischaracterization of the process or its misinterpretation of the bidding

instructions and statutes cannot create a property right protected by due process. Although Petitioner was interested in securing the 1988 contract, Petitioner had no legitimate claim of entitlement to the contract. Petitioner's interest and expectation in obtaining the contract was unilateral, and as such, was insufficient to establish a protected property right. *Roth, 92 S.Ct. at 2709.*

The bidding process confers no constitutionally protected property right requiring due process. Applicable state law and agency regulations specifically exempt competitive bidding from appeal. Petitioner had no constitutionally protected property right in its bid for the 1988 contract. Absent a property right, Petitioner was not entitled to any due process following the rejection of its contract bid.

CONCLUSION

For the reasons discussed above, Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

MARY F. KELLER
First Assistant Attorney General

LOU McCREARY
Executive Assistant Attorney General

JAMES C. TODD
Chief
General Litigation Div.
Texas Bar No. 20094700
P.O. Box 12548
Capitol Station
Austin, Texas 78711
(512) 463-2120

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document was served on opposing counsel on this the _____ day of November, 1989 by United States Mail, certified, return receipt requested, to:

Fernando Chacon
310 N. Mesa
Suite 325
El Paso, Texas 79901

Eduardo N. Lerma
Attorney at Law
1417 Montana Ave.
El Paso, Texas 79902

JAMES C. TODD
Chief
General Litigation Div.

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TEXAS ADMINISTRATIVE CODE

TITLE 40
SOCIAL SERVICES AND ASSISTANCE

§69.204. **Duration and Renewal of Contracts**

(c) Renewal of a contract is not automatic; the contract may be renewed at the department's option, when authorized, and when it is in the department's best interests.

§69.209. **Noncompetitive Negotiation**

(a) staff may use noncompetitive negotiation if one of the following is applicable.

(4) No acceptable bids using a competitive procurement method are received.

§69.227. **Screening**

(a) An offeror must meet all screeming requirements in the solicitation; otherwise, the offer is eliminated from further consideration

§69.269. **Contract Termination**

Terminations of contracts occur when the term of the contract expires, both parties mutually agree to end the contract, and/or when either party terminates a contract because of unreconcilable differences.

Texas Department of Human Services
1200 Golden Key Circle, 4th Floor
P.O. Box 10276
El Paso, Texas 79994

Contract Services
Mail Code 111-1
(915) 595-1700

COMMISSIONER

MARLIN W. JOHNSTON

November 6, 1987

Mr. Jose Rivera, Chairperson
Trinity Coalition
3125 Rivera Avenue
El Paso, Texas 79905

Re: Award Notification for Day Home Services, Region 03, Texas Department of Human Services, El Paso County, Texas, Request for Proposal 03 D 88 Effective January 1, 1988

Dear Mr. Rivera:

In accord with the policies and procedures of the above referenced Request for Proposal (RFP), Region 023 of the Texas Department of Human Services announces its determination that the proposal submitted by Trinity Coalition has been found to be non-responsive.

This determination is based on the RFP Committee's consensual finding that Trinity's proposal failed to meet Item #5 of the assurances which states:

> *"It owes no funds to the Department for unresolved audit exceptions. An unresolved audit exception is an exception for which the contractor has exhausted all administrative and judicial remedies and*

also refuses to comply with resulting written demands for payment from the Department."

The Department appreciates the interest and energy invested by you in your application.

All unsuccessful offerors responding to an RFP are entitled to request a debriefing relating to the general strengths and weaknesses of the proposals. If you wish to request a debriefing, I must receive a written request within ten (10) days of the receipt of this letter.

Sincerely,

Melinda Read
Contract Manager

TRINITY COALITION
3125 RIVERA AVENUE
EL PASO, TEXAS 79905 (915) 533-5991

November 16, 1987

Honorable Judge
Ms. Susan Nash Fekety
Administrative Law Judge
Texas Department of Human Services
John H. Winters Center
701 W. 51st Street
Austin, Texas 78769

Dear Honorable Judge Fekety:

On November 6, 1987, Trinity Coalition received an Award Notification Letter in reference to RFP #03 D 88 denying Trinity Coalition a contract for 1988. (please see attached letter)

Trinity Coalition is appealing in accordance with RFP 03 D 88, Proposal Submission Instructions, page 8,

> *". . .the current Contractor may appeal the nonrenewal or funding reduction under the auspices of Senate Bill 117, which took effect on September 1, 1983. The Department will notify the current contractor of its appeal rights in writing."*

Thank you for your attention.

Sincerely,

for
Jose Rivera
Chairperson, Board of Director

Texas Department of Human Services
John W. Winters Human Services Center
701 West 51st Street
P.O. Box 2960, Austin, Texas 78769

COMMISSIONER

MARLIN W. JOHNSTON

CERTIFIED MAIL,RETURN RECEIPT REQUESTED

November 19, 1987

Mr. Jose Rivera, Chairperson
Trinity Coalition
3125 Rivera Avenue
El Paso, Texas 79905

Dear Mr. Rivera:

This is in response to your November 16, 1987 letter requesting a hearing of the Department's decision not to award Trinity Coalition a contract. I have been informed that Trinity Coalition's bid for a contract in response to a Department request for proposal (RFP), and that your organization was determined by the Department to be non-responsive to the RFP. For that reason, no contract was offered to your organization.

The S.B. 117 which was referenced in the RFP is Tex. Rev. Civ. Stat. art. 6252-13e. When this statute was enacted in 1983, it gave fairly broad rights of appeal to block grant contractors whose funding was reduced or terminated. However, in 1985 the Legislature amended Section 9 of the act to provide that the appeal rights were not available ". . .if an entity's block grant funding becomes subject to the agency's competitive evaluation." The Department's rules allowing contractors to appeal

likewise indicate that no appeal is available in a competitive procurement setting.

The Department's procurement rules require competitive bidding for substantially all of its contracted services, including those upon which Trinity Coalition bid. Consequently, no hearing is available under art. 6252-13e or the Department's rules to allow your organization to contest the refusal of the Department to award a contract following competitive bids.

Sincerely,

Susan Nash Fekety
Administrative Law Judge

bsm